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BRIEF

No. 10-1491

Supreme Court, U.S.
FILED
DEC 20 2011
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IN THE

Supreme Court of the United States

ESTHER KIOBEL, *et al.*,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* THOMAS J. SHOENBAUM, J.D., PH.D., IN SUPPORT OF PETITIONERS

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I. INTEREST OF AMICUS

Amicus is Research Professor of Law at the George Washington University, Washington, DC, the Dean Rusk Professor of International Law, Emeritus at the University of Georgia, and an attorney who has spent much of his professional life in the practice, teaching and research of admiralty and maritime law.[1] He is the founding Executive Director of the Tulane Maritime Law Center (1979-1983). He has taught law since 1968 at the University of North Carolina at Chapel Hill, Tulane University, University of Georgia, International Christian University (Tokyo) and George Washington University.

Amicus is the author of many books and articles on admiralty and maritime law as well as international law topics. His major work, considered a leading work on the law, is *Admiralty and Maritime Law, Practitioners Edition*, (Westgroup, 5th ed. 2011). This treatise and its previous editions are regularly cited by the federal and state courts, including by this Court.

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[1] Pursuant to Rule 37.6, amicus certifies that no counsel for a party authored this brief, in whole or part, and no counsel for a party made a monetary contribution intended to fund preparation or submission of the brief. The law firm Hagens Berman Sobol Shapiro LLP provided funding for the expense of submitting this brief. Pursuant to Rule 37.2(a), the parties have consented to the filing of the brief of amicus curiae, with letters of consent previously lodged with the Court.

Amicus has never before worked on or had any contact with the case at bar. Amicus is a member of the Bar of this Court. The only interest of amicus in this case is concern for justice and the proper development of the important field of admiralty and maritime law. Amicus regards this case as very important to these concerns.

II. SUMMARY OF ARGUMENT

Since maritime law was an important branch of the law of nations when the Alien Tort Statute was enacted, it is relevant to the issues before the Court to elucidate the contours of maritime law and to show how this body of law was received into American law by the adoption of the Constitution in 1787. In maritime cases of the time, before and after 1787, there is no record of immunity of any private actor, and business entities such as the East India Company, insurance syndicates, and partnerships appeared before courts as litigants, including as defendants. The early maritime law of the United States paralleled judge-made law on the subject outside the United States. Entities such as ships were liable in tort, and business entities such as partnerships could be sued. When corporations became common in the United States in the nineteenth century, the U.S. courts in maritime cases extended jurisdiction over them in maritime tort cases without discussion.

III. ARGUMENT

A. Judge-made maritime law that existed in 1789-both as part of the law of nations and the laws of the United States-informs interpretation of the Alien Tort Statute today.

In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 (2004), this Court ruled that the Alien Tort Statute (ATS), 28 U.S.C. § 1350, is jurisdictional, and that the First Congress,

which enacted it, "assumed that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction." This Court further stated that in the years of the early Republic, what was then called the law of nations and is now called international law, comprised two principal elements: (1) a body of law covering "general norms governing the behavior of national states with each other," *id.* at 714; and (2) a "body of judge-made law" regulating activities carried out "outside domestic boundaries," the "law merchant" relating to trade and "maritime causes." *Id.* at 715. This Court also ruled that the ATS was passed, most probably, to deal with a "hybrid sphere" of offenses sounding in tort, "in which [the] rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships." *Id.* at 715.

The maritime law was part of the "body of 'judge-made' law" to which the Court's opinion in *Sosa* referred. It pre-dated the Constitution, and represented the oldest branch of the "law of nations," or what courts even today commonly call the *jus gentium*. *See R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960 (4th Cir. 1999). This body of maritime law, a part of the "law merchant," has existed for 3,000 years or more. *Id.* The precise origins of this ancient law are lost in the mists of time, but the Greek orator Demosthenes participated in five ancient maritime law cases involving cargo ships (*Dem.* 32 to 35 and 56), and the ancient sea laws were codified by the Byzantine Emperor Justinian as the *Rhodian Sea Laws*, part of the *Corpus Juris Civilis* (533 C.E.). *See The Rhodian Sea Law* (Ashburner ed. 1909). In the Middle Ages these laws were adopted by cities in Italy and Spain as well as England (the *Laws of Oleron*, 1189), and later by the Hanseatic League (1597). *See* F. Sanborn, *Origins of the Early English Maritime and Commercial Law* (1930).

From Europe these laws came to the United States. Thomas J. Schoenbaum, *Admiralty and Maritime Law, Practitioners' Edition* 18-21 (5th ed. 2011). This Court has commented eloquently on how this body of maritime law was incorporated into American law by the Founders of our Republic. In *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 385-86 (1924), this Court stated that the Founders, in adopting Article III, section 2 of the Constitution, not only extended the judicial power of the United States to "all cases of admiralty and maritime jurisdiction," but also by this provision incorporated the then-existing substantive, judge-made international maritime law into the laws of the United States. As this Court stated in *Panama R.R.*, 264 U.S. at 386, this body of law:

> embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind.

This Court recognized that the Founders did not intend to "strike down or abrogate the system," but instead sought to bring it under "national control." *Id.* Finally, this Court noted the domestic system and law would evolve, stating that "[a]fter the Constitution went into effect, the substantive [maritime] law ... was subject to power in Congress to alter, qualify, or supplement it as experience or changing conditions might require." *Id.*

This Court has also ruled that not only the Congress, but also the federal judiciary, has the authority to continue the development of the general maritime law that was adopted substantively into American law in 1787. In *Romero v. International Terminal Operating Co.*, 358 U.S.

354, 360-61 (1959), this Court stated that Article III, section 2 of the Constitution "empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction' ... and to continue the development of this law...." Thus, since 1787, through the common law, the federal courts have had the power to continue the judge-made character of the general maritime law. These interpretations shed light on the character of the second branch of "law of nations" – the law merchant and maritime causes – referred to by this Court in the *Sosa* case. Before the Constitution was adopted, the general maritime law was solely law of nations, part of the ancient "law merchant." But after the Constitution was adopted the general maritime law became, *in addition*, part of the laws of the United States. *See The Paquete Habana*, 175 U.S. 677, 700 (1900) ("international law is part of our law.") To this day, general maritime law remains part of the laws of the United States, as modified by Congress and by the federal courts.

In *Sosa*, this Court interpreted the ATS as a jurisdictional statute giving the federal courts the authority to adjudicate certain torts that fall into the narrow range of "hybrid international norms." *Sosa*, 542 U.S. at 715. After the Constitution incorporated maritime law into the law of the United States, there were effectively two bodies of maritime law relevant for purposes of understanding these hybrid norms under the ATS: (1) the law of nations; and (2) the domestic maritime law of the United States. Since the ATS confers jurisdiction over a tort "committed in violation of the law of nations," with regard to the substantive norm, the relevant body of law is the maritime law of the law of nations. Nevertheless, since the ATS was enacted only two years after the adoption of the

Constitution, for all practical purposes it may be assumed that at that time the two bodies of law were virtually the same and remained so for some time. The maritime law of the United States, including modifications made by the Congress and the federal courts, is particularly relevant to issues not answered by substantive international maritime law.

Thus maritime law informs the question that this Court posed in *Sosa* about, "the interaction between the ATS at the time of its enactment and the ambient law of the era." *Sosa*, 542 U.S. at 714. In interpreting the ATS, this Court may look to decisions under the general maritime law of the United States. *See Lauritzen v. Larsen*, 345 U.S. 571, 581 (1953) ("courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality"); *see also Ex Parte Western Maid*, 257 U.S. 419, 432 (1922); *United States v. W. M. Webb, Inc.*, 397 U.S. 179, 191 (1970).[2]

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[2] To this day there is a close correspondence between the international maritime law and the general maritime law of the United States. For example, the United States, by Presidential Proclamation, accepts provisions on the traditional uses of the oceans, as stated in the United Nations Convention on the Law of the Sea (to which the United States is not a party), as customary international law. *Presidential Proclamation 5030 of March 10, 1983*, 48 Fed. Reg. 10605 (1983).

B. Maritime lawhas always recognized liability for tort violations whether committed by natural persons or entities.

There is no record of any immunity from suit for any private actor in maritime law during the centuries leading up to the adoption of the United States' Constitution in 1787, and the ATS in 1789. On the contrary, the cases involved a wide variety of business forms as well as individual, breathing persons. Justice Joseph Story, a member of this Court from 1811 to 1845, the author of the famous international law case, *The Amistad*, 40 U.S. 518 (1841), and perhaps the foremost expert on maritime and international law in the early years of the Republic, penned a comprehensive history of international maritime law cases in deciding the case *DeLovio v. Boit* (No. 3,776), 7 Fed. Cas. 418 (C.C.D. Mass. 1815).

The *DeLovio* case was a lawsuit (a libel in admiralty terminology) brought in the U.S. district court of Massachusetts on a policy of marine insurance, invoking the admiralty jurisdiction of the federal courts. Justice Story, while upholding admiralty jurisdiction, thought it necessary to provide a comprehensive history of the exercise of maritime jurisdiction by the English courts as well as courts in continental Europe. His scholarly opinion cites cases from the ancient Black Book of the Admiralty in England as well as virtually all the commentators and legal scholars of the times. From analysis of all "learned treatises on the admiralty jurisdiction" Story concluded that the exercise of maritime jurisdiction was "coeval and coextensive" in England and in "other foreign maritime

courts," "over all maritime torts, offenses and contracts ... and regulated by the same principles ..., the ancient customs of the sea." 7 Fed. Cas. at 421. Story in particular singles out the fact that "merchant strangers" were within the jurisdiction of the courts so that if they committed a robbery at sea, the courts could have them arrested with their goods and "keep them under arrest until they have satisfied the party his damages." 7 Fed. Cas. at 422. Story's account is devoid of any hint of immunity for any private actor of the time.

A famous maritime law case in which a corporation was a litigant is the *Santa Catarina* prize proceeding in the Amsterdam Admiralty Court in 1604. This case arose out of the capture by the Dutch captain of the *Santa Catarina*, a Portuguese vessel, in the Straits of Singapore on 23 February 1603. The vessel and her cargo were taken to Amsterdam by the Dutch East India Company, which had been chartered by the Estates-General of the Netherlands in 1602, and granted a monopoly for the East Indies trade. On 4 September 1604, the Amsterdam Admiralty Court decreed the vessel and her cargo subject to the law of prize and ordered the proceeds to accrue to the Dutch East India Company. The ruling was justified by the court on the grounds that Holland, which had broken away from Spain in 1581, was still at war with the Iberian Union (1581-1640), the united Spanish and Portuguese state of the time. This history is recounted in Peter Borschberg, *Hugo Grotius, the Portuguese, and Free Trade in the East Indies* (Singapore and Leiden: NUS Press and KITLV Press, 2011) and Edward Gordon, Grotius and the Freedom of the Seas in the Seventeenth Century, 16 *Willamette J. of Int'l L. & Dispute Resolution* 252 (2008).

The *Santa Catarina* case is celebrated because, when the Iberian Union and some shareholders of the East India

Company objected to the ruling, the young scholar Hugo Grotius (1583-1645) was retained to write a justification of the Dutch East India Company's legal position. Grotius wrote his well-known work, *De Jure Praedae* (On the Law of Prize) in response to this commission. Although the entire *De Jure Praedae* was not published until 1864, one chapter was published in November, 1608, under the title, *Mare Liberum* (The Free Sea). *Mare Liberum* is a legal "Brandeis Brief" on the right to freedom of navigation of the seas and free trade, in opposition to the claims of the Spanish/Portuguese crown to enclose large portions of the oceans as sovereign territories. For a modern translation, *see* Ralph Van DeMan Magoffin (trans), Hugo Grotius, *The Freedom of the Seas* (New York: Oxford University Press, 1916). In this work Grotius argues to the court (*id.*, p. 44) that "he who prevents another from navigating the sea has no support in law." Citing the Roman jurist Ulpian, Grotius further argues that such a person is liable for damages and injunctive relief. (*Id.*) Grotius wrote that, "The law by which our case is to be decided is not difficult to find, seeing that it is the same among all nations." (*Id.*, p. 5.)

Mare Liberum is justifiably famous as a work that helped Grotius to lay claim to be the "father of international law." In the *Santa Catarina* case, the Amsterdam Admiralty Court accepted jurisdiction over both the Dutch East India Company as defendant and the vessel and her cargo as plaintiffs.

Later in the seventeenth century, the British East India Company was held liable to pay damages in an international maritime tort case by the English House of Lords. The *Case of Thomas Skinner, Merchant v. The East India Company* (1666) 6 State Trials 710 (H.L.). This case stemmed from a Petition presented to King Charles II by Thomas Skinner, complaining of "great oppressions and

spoils sustained by him in the Indies" by the Company, which he alleged assaulted his person, robbed him of his ship and goods, and confiscated his island plantation in 1658. The King ordered the Petition to be heard by the House of Lords. *Id.* at 711. The British East India Company by its Secretary filed a pleading in the House of Lords denying liability, primarily on the ground that "the Company are not liable for... the action of their factors, unless done by their order." *Id.* at 713-14. Before deciding the case, the Lords requested an opinion from the King's courts at Westminster Hall. The Chief Justice reported that all the judges agreed that at least part of the case, the confiscation of the island property, as "a robbery committed *super altum mare*," was "not relievable in any ordinary court of law." *Id.* at 719. The House of Lords then heard the case and found the East India Company liable for 5000 pounds in damages. The Lords based their decision on the fact that the incidents in question were not merely ordinary wrongs, but were also "a violent interruption of the trade of the nation; which concerns the government of the kingdom, is a matter of state, and highly entrenches upon the authority of the king." *Id.* at 788.

The Company meanwhile filed a Petition in the English House of Commons contesting the jurisdiction of the House of Lords, not because of any immunity, but because the Lords had exceeded their authority by hearing a first instance case. *Id.* at 721-24. This Petition precipitated a row between the House of Lords and the House of Commons lasting over two years, during which both chambers held to their respective positions. Then the House of Commons in 1669 passed a resolution that "whoever should be aiding, in execution of the order of the Lords in the case of Skinner against the East India Company, should be deemed a betrayer of the rights and liberties of the Commons of England and an infringer of the

privileges of the House of Commons." *Id.* at 763. King Charles proposed a compromise to end the quarrel, but this was rejected by the Commons. In the end, the King and Lords backed down: the King, "for the sake of pecuniary supply proposed a retreat to [the Lords]" – the judgment against the East India Company was vacated by the Lords in 1670. *Id.* at 779.

Despite the vacation of the judgment, *Skinner's Case* shows that the British East India Company was not immune to suit and could be a defendant in a case involving international maritime tort. At least one American court has relied upon *Skinner's Case* to hold that "the courts could give relief" for torts committed by a company through its agents, "notwithstanding these were done beyond the seas." *Eachus v. Trustees of the Illinois & Michigan Canal*, 17 Ill. 534, 536 (1856).

Early litigation in the United States' courts under the domestic maritime law is also relevant to the issues in the case at bar since the American maritime law of the early nineteenth century was virtually identical to judge-made maritime law outside the United States. In *The Rebecca* (Case No. 11,619), 20 F. Cas. 373, 1 Ware 187 (D. Me. 1831), the court applied the general principle common to all maritime law, both inside and outside the United States, that makes a vessel liable for the tortious acts of the master, although the shipowner is not personally liable. Thus, the vessel, a thing, is a proper defendant in a maritime tort case, a rule which still holds today. *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 6 L. Ed. 369 (1825); FED. R. CIV. P., Supplemental Rule C.

In his opinion in *The Rebecca*, Judge Ware found the origin of this rule in the fact that in the Middle Ages many

merchants engaged in commerce formed limited liability entities called *commenda*, which we would call limited partnerships, and imposing liability on the ship for tortious conduct was a way of imposing liability on the *commenda*, while still respecting the limited liability in their charters. 20 F. Cas. at 378. *In rem* judgments for violation of the international law of piracy were also rendered against ships. *See The Malek Adhel*, 43 U.S. (2 How.) 210 (1844); *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826). In the former case Justice Story stated that "It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offense has been done as offender." 43 U.S. (2 How.) at 233. Thus, from earliest times in the United States defendants other than natural persons have been defendants in tort cases.

Finally, corporations were also accepted without question as defendants in early maritime cases. *See, e.g., The Maryland Ins. Co. v. Woods*, 10 U.S. (6 Cranch) 29, 3 L. Ed. 143 (1810) (marine insurance case); and *New Jersey Steam Nav. Co. v. Merchant's Bank of Boston*, 47 U.S. 344 (1848) (marine cargo case). In the nineteenth century this Court also accepted that corporations may be liable in tort under the general maritime law. *See, e.g., E.g., Philadelphia Wilmington & Baltimore R.R. Co. v. The Philadelphia & Havre de Grace Steam Towboat Co.*, 64 U.S. (23 How.) 209, 16 L. Ed. 433 (1860). Thus history establishes that juridical entities could be sued under maritime law.

CONCLUSION

Accordingly, the judgment of the Court of Appeals for the Second Circuit in the case at bar should be reversed.

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December 2011 *Amicus Curiae*